In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Brief of Respondent Pacific Westbound Conference

EDWARD D. RANSOM
R. FREDERIC FISHER
LILLICK, GEARY, WHEAT, ADAMS & CHARLES
311 California Street
San Francisco, California 94104
Attorneys for Respondent Pacific Westbound Conference, and its member lines.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS

STATUTES

UNITED STATES CONSTITUTION

RULES

CONGRESSIONAL MATERIAL

TEXTS AND MISCELLANEOUS

All emphasis is ours unless otherwise indicated.

All record references "(R)" refer to pages of the printed record. Petitioner's brief is cited as "(Pet. Br.)". The brief for the United States and the Federal Maritime Commission filed by the Solicitor General is referred to as "(S.G. Br.)".

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Brief of Respondent Pacific Westbound Conference

QUESTION PRESENTED

The complaint, seeking treble damages, alleges violations of the antitrust acts which are also violations of the Shipping Act. The Shipping Act provides remedies and penalties for such violations. The question presented is: Did not the district court, as affirmed by the unanimous decision of the Court of Appeals for the Ninth Circuit, correctly hold that

the remedies and penalties of the Shipping Act here supersede the remedies and penalties of the Sherman Act and that the Federal Maritime Commission has exclusive primary (original) jurisdiction of the matter subject to appeal to the circuit courts?

The Solicitor General has now introduced a further question: Where the Commission, since the holding of the courts below, has found that the ocean carriers have put into effect an agreement prior to approval of the Federal Maritime Commission in violation of Section 15 of the Shipping Act, and also in violation of Section 16 of the Shipping Act, are the remedies and penalties under the antitrust acts in addition to the remedies and penalties under the Shipping Act thereby made applicable?

STATEMENT OF CASE

The district court dismissed petitioner's complaint which alleged that respondents agreed to and did fix ocean freight rates in violation of the antitrust laws (Sherman Act, §§ 1 and 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1 and 2 (1958); Clayton Act, § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958)). The complaint also alleged a failure to file with and obtain approval from the Federal Maritime Commission of agreements as required by Section 15 of the Shipping Act, 1916 (39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1958) (hereinafter, "Section 15")[1]) (R. 21).

---

1. All references to the Shipping Act should be taken as excluding the 1961 and 1964 amendments thereto (unless otherwise indicated), which are not applicable to the case before the Court. Section 15 of the Act requires that common carriers by water file with the Federal Maritime Commission agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition, . . .

Petitioner is a shipper. Respondents are steamship rate making conferences and their member lines engaged in ocean commerce from the West Coast of the United States (Pacific Westbound Conference (PWC)) and from East and Gulf Coast ports (Far East Conference (FEC)) (R. 16, 17). The Federal Maritime Commission intervened as a defendant (R. 33-35).

PWC and FEC operate as rate making bodies pursuant to separate agreements approved by the Federal Maritime Commission or its predecessor agencies,[2] as required by Section 15 of the Shipping Act, 1916. The members of the two Conferences have further agreed in Federal Maritime Board Agreement No. 8200, approved by the Commission, to take joint action in establishing rates to the Far East (R. 39, 45-50, 182). Agreement 8200 provides that each Conference may, after notice, take independent action in changing rates, notwithstanding anything in Agreement 8200 (or rules and regulations to be adopted) to the contrary (R. 48).

The roots of this case lie in and the case is intimately related to an investigation of Agreement 8200 initiated by the Commission on October 26, 1959, more than three years preceding the filing of the complaint in this case (R. 37-40). The parties named in the Commission's Order of Investigation were virtually identical to respondents in this

---

or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The Commission is directed to approve all such agreements that it does not find to violate stated standards. Agreements "lawful" under Section 15 are expressly excepted from the antitrust laws. (See also Shipping Act, 1916, § 14 (39 Stat. 733 (1916), as amended, 46 U.S.C. § 812 (1958) (hereinafter, "Section 14").)

2. The predecessor agencies include the United States Shipping Board, the United States Maritime Commission and the Federal Maritime Board. Hereinafter, the "Commission".

case (R. 9-11, 40). That Order recited that Agreement 8200, as approved, provides that the parties may

> "act jointly for the purpose of establishing the rates and rules and regulations relating to the transportation by them of commodities exported from the United States to Far East destinations. . . ." (R. 39.)

The stated purpose of the investigation was to determine: "whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Section 15" and "whether it is being carried out in a manner which" violates Section 15 or other provisions of the Shipping Act (R. 40).

Carnation intervened in the investigation of Agreement 8200 on August 16, 1960 (R. 41-44). In its Petition to Intervene Carnation cited its information that PWC's ocean freight rates and PWC's rules were the result of negotiations between FEC and PWC members and alleged that the negotiations were to the detriment of Carnation. Carnation subsequently participated fully as a party to the investigation (see R. 37-38). At no time, however, did Carnation avail itself of the opportunity to seek reparations[3] for violation of any section of the Shipping Act (*FMC Docket 872, Joint Agreement between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference,* 6 Pike & Fischer Shipping Regulation Reports (SRR) 99, 110 n. 4 (1965) (hereinafter, "Docket 872")).

On December 5, 1962, even before the Presiding Examiner had issued his decision in the investigation, Carnation filed its complaint in the instant case. The complaint sought

---

3. Carnation's right to seek reparations before the Federal Maritime Commission arises from Section 22 of the Act (39 Stat. 736 (1916), as amended, 46 U.S.C. § 821 (1958) (hereinafter, "Section 22")) and is discussed at length *infra,* section II-B-3.

treble damages and alleged that respondents entered into an unlawful agreement to fix and did fix ocean freight rates (R. 19-20, 21, 24-25). But, as the court of appeals stated and the Commission has now found, Agreement 8200 "expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences"[4] (Court of Appeals Opinion, R. 183, see R. 182; Docket 872, 6 SRR 101-02; R. 39). Thus, the fixing of ocean freight rates alleged was carried out under an agreement approved under Section 15 of the Shipping Act and thereby expressly exempted from the antitrust laws.[5]

To avoid the barrier of Section 15 approval, Carnation alleged a secret agreement, unfiled with the Commission, under which PWC, contrary to the provisions of Agreement 8200,[6] gave up its right to take independent action on rates other than those on an "initiative list", which list did not until May, 1961 include the products shipped by Carnation.[7] *It is this alleged secret agreement which is the gravamen*

4. As the Brief of the Solicitor General expresses it, "The agreement [8200] provided for joint conference action with respect to rates;" (S.G. Br. 5-6).

5. See Note 1, *supra.*

6. Paragraph 18(c) of Carnation's complaint reads:

"(c) That defendant PWC, contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200, would make no change in any rate established by it or fixed as aforesaid and to be charged by its members for transportation of commodities by water from Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands included), without the concurrence of defendant FEC, except a rate for a commodity included in a list established by defendants acting pursuant to said secret and unlawful association, combination, conspiracy and agreement and known as a 'list of initiative items' in respect of which defendant PWC might establish rates without the concurrence of defendant FEC;" (R. 20)

7. Carnation also alleged "That certain specified commodities should be on the . . . list of initiative items" referred to in the complaint as quoted in Note 6 (R. 20).

of the complaint, for it is alleged that, pursuant to it rather than pursuant to the approved agreements, in May, 1957 rates on products shipped by Carnation were raised $2.50 per ton, and a subsequent request for a rate reduction from PWC was rejected. At the time the motion to dismiss was granted and dismissal affirmed, the Commission had not determined whether the alleged secret agreement to forego independent action or the alleged understandings regarding the initiative list had been made. It had not yet determined whether if made subsidiary agreements respecting the machinery for placing items on the initiative list fell within the scope of approval of Agreement 8200. Such questions were the very essence of the Commission's investigation of possible Shipping Act violations under Agreement 8200.[8] The Commission's Order of Investigation specifically referred to the question whether Agreement 8200 was a "true and complete agreement of the parties" (R. 40).

The other aspect of the Shipping Act directly involved in the administrative investigation but also applicable to matters alleged in the complaint concerned discrimination and prejudice in the treatment of Carnation's rate request—unreasonable refusal by PWC to exercise its right to take independent action and failure of FEC to concur in granting Carnation a lower rate (see Docket 872, 6 SRR at 110). This conduct, scrutinized under Section 16 of the Act[9] (39

---

8. Carnation's counsel frankly acknowledged this fact during oral argument before the district judge. He stated:

> ". . . we are not pleading in the dark because we had documentation when we drew this Complaint, documentation which, indeed, was developed in a proceeding which is now pending before the Commission." (R. 102)

9. Section 16, in relevant part, makes it a misdemeanor, punishable by fine, "To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person,

Stat. 734 (1916), as amended, 46 U.S.C. § 815 (1958) (hereinafter, "Section 16")) and closely intertwined with Section 15 questions, was alleged as an antitrust violation by Carnation (R. 20, 22). As stated by the court of appeals below:

> "It thus appears that prior to and at the time of the institution of this action the Commission had under investigation substantially the same question as that sought to be raised by the complaint filed under the antitrust laws." (R. 161)

Respondents PWC and FEC accordingly moved to dismiss the complaint on the ground that the wrongs alleged were violations of the Shipping Act, which, with respect to the matters alleged, superseded the antitrust laws. Adjudication of the matters alleged was within the exclusive jurisdiction of the Federal Maritime Commission (R. 26-28). The Commission intervened as a defendant (R. 33, 108) and moved to dismiss the complaint on the grounds urged by PWC and FEC (R. 34-35).

On June 25, 1963, the district court granted the motions to dismiss filed by PWC, FEC and the Federal Maritime Commission (R. 138).[10] The dismissal was unanimously affirmed by the Court of Appeals for the Ninth Circuit (R. 157-87) and reaffirmed in an opinion denying Carnation's Petition for Rehearing (R. 200-201). Certiorari was granted by this Court on March 1, 1965 (R. 203).

Action by the Commission in Docket 872

The Federal Maritime Commission has now issued its Opinion and Decision in Docket 872, the administrative in-

---

locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (See also Shipping Act, 1916, § 17, 39 Stat. 734, as amended, 46 U.S.C. § 816 (1958) (hereinafter, "Section 17").)

10. Carnation at no time below requested a stay.

vestigation of Agreement 8200. The Commission's opinion resolves all the questions raised by the complaint, but resolves them under the applicable provisions of the Shipping Act.

The Commission's Opinion rejects the complaint's charge that respondents, without Section 15 approval, "agreed upon and fixed rates for transportation by water . . . to the Far East." (R. 21, R. 19-20). The Commission, as the court of appeals also found self-evident,[11] held such agreement to be within 8200, saying,

> "By the terms of the agreement [8200], the parties thereto agree to establish from time to time 'rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates.'" (Docket 872, 6 SRR at 101-02.) (Compare, *e.g.*, Complaint, para. 18(b), R. 20.)

The Commission disposed of Carnation's claim of a secret agreement by which PWC gave up its right to take independent action on rate matters—the heart of the complaint—*by holding no such agreement ever existed:*

---

11. As the court phrased it:

> "It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement 'it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates.'" (R. 182)
>
> • • •
>
> "We have noted that it . . . [Agreement No. 8200] expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates." (R. 183)

> "We are unable to find any evidence of a secret agreement between Pacific Westbound and Far East that Pacific Westbound would give up its right of independent action. Such an agreement, we hold, has never existed. The right was created in Agreement 8200 in conformance with the statutory requirement, and it was never given up."[12] (Docket 872, 6 SRR at 108)

Recognizing that the Commission's decision rejected the essential antitrust contention, Carnation under date of August 30, 1965, petitioned the Commission for reconsideration of the finding that there was no secret agreement that PWC would give up the right to take independent action.

The Commission resolved the remaining questions raised by the complaint by finding violations of the Shipping Act. Respondents were held to have violated Section 15 by carrying out without Commission approval supplementary agreements relating to the initiative list and machinery governing the taking of joint action under 8200 (Docket 872, 6

---

12. The Commission further stated: "This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act." (6 SRR at 110) And:

"(3) the right of independent action is preserved by Agreement No. 8200, as required by section 15 of the Shipping Act, 1916, and neither party is found to have surrendered the right by means of a secret agreement;" (6 SRR at 112)

In the Solicitor General's "Memorandum for the Federal Maritime Commission on Cert." the alleged secret agreement is said to be the understanding whereby PWC "surrendered its right to act independently except with respect to certain commodities" (p. 2). "The questions involved in the case" are stated as "[1] whether the alleged secret agreement between Pacific and Far East 'was made in fact; [2] whether, if made, it was contrary to Agreement 8200; and finally, [3] whether it would be required to be filed with and approved by the Commission' (Pet. App. 31)" (S.G. Mem. on Cert., p. 4). Obviously the last two questions are dependent on the first and since the Commission has found that this alleged secret agreement never existed, all questions said to be "involved in the case" were resolved by the Commission.

SRR at 107). All agreements remained subject to PWC's right to take independent rate action.

The door remains open, however, for future approval of the supplementary agreements. The Commission determined that the supplementary agreements must be refiled with it. It refused to state whether or not it would approve those agreements when and if filed.[13]

By its holding that the parties had carried out certain agreements beyond the scope of approved Agreement 8200 the Commission opened up the possibility that the penalties as provided in Sections 15 and 16 of the Shipping Act may be sought.[14] The Commission also indicated its willingness to grant reparations to Carnation, had Carnation sought them. The Commission observed that Carnation had failed to file a complaint for reparations under Section 22 of the Act (6 SRR at 110 n. 4).

SUMMARY OF ARGUMENT

The allegations of the complaint and the administrative investigation in which the complaint has its roots demonstrate why the only proper course for the district court was to dismiss the complaint. The case may be considered as of the time when the district court dismissed the complaint and the issues raised therein were under active consideration by the Commission. The case may also be considered as of the present, when the Commission has rejected the central antitrust allegation (a secret agreement under

---

13. The Commission paved the way for future approval by rejecting the Examiner's conclusion that supplementary concurrence agreements violated the 1961 amendment to Section 15 (75 Stat. 763 (1961), 46 U.S.C. § 814 (Supp. V, 1964)) requiring that Section 15 agreements include provisions preserving the right to take independent action (6 SRR at 108).

14. The penalty provisions of the Shipping Act are discussed in more detail *infra*, section II-B-3.

which PWC gave up the right in Agreement 8200 to take independent rate action) as factually unfounded; has determined that the agreement to act jointly in fixing rates was previously lawfully approved; and, has ruled that respondents' conduct complained of in other respects violates Section 15 of the Shipping Act and constitutes unreasonable prejudice and disadvantage in violation of Section 16 of the Act.

From either standpoint, the complaint raises a number of Shipping Act questions and asserts as an antitrust violation conduct prohibited by the Shipping Act. Under this pervasive regulatory statute, and with respect to the very conduct questioned by the complaint, the Federal Maritime Commission has, we submit, broader powers to act than do regulatory agencies in any other field. Specifically, by its order and decision, it could provide redress and issue cease and desist orders. The former it indicated willingness to do had Carnation only asked; the latter it did. Additionally, the Shipping Act provides massive penalties which, if the conduct warrants, can be far greater than the punitive two-thirds of the treble damage antitrust remedy.

Under the decisions of this Court the foregoing factors required the district court and the court of appeals to dismiss the complaint. The holdings, language, reasoning and policy considerations in the Supreme Court decisions all require the conclusion reached below.

Even assuming there were no governing decisions by this Court requiring dismissal here, the same result would be demanded by expressions by Congress that it intended the remedy for conduct violative of the Shipping Act to be exclusively the remedy provided by the Act. Dismissal accords with the Shipping Act's principal tenet that agreement on prices between competitors is not only an allowable,

but a desirable pattern for this particular industry. The Act therefore is inconsistent with intrusion of antitrust principles.

The position that antitrust remedies and penalties are required as additional weapons to enforce the Shipping Act is unacceptable to Congress. During a thorough review of the Shipping Act preceding its 1961 amendment, Congress rejected a specific proposal by the Department of Justice to add antitrust penalties and remedies to those provided by Section 15 of the Act. Instead, Congress amended the Act to reduce the already too rigid and too severe penalty provisions.

Neither policy considerations, reason, nor the equities of this case militate in favor of reversing the courts below and thereby departing from a long line of this Court's decisions and disregarding the commands of the Shipping Act's legislative history and recent expressions of Congress. To the contrary, full remedies and sanctions are available under the Shipping Act for the conduct here alleged. It is not rational to introduce antitrust precepts into a statutory scheme founded on the assumption that intercompetitor price agreement is desirable. To do so would cause practical procedural clashes between court and agency and violate other precepts of the regulatory scheme; most particularly, its condemnation of allowing shippers in any way to gain a competitive advantage over others by means of rebates, recoveries that more than make particular shippers whole, or any other departure from uniform rates equally applicable to all. It would, moreover, be unnecessary as well as unfair to subject persons covered by the Shipping Act, a regime designed by Congress to replace the antitrust laws, to both its regulatory sanctions and penalties and the similar provisions of the antitrust laws.

ARGUMENT

I. Decisions of This Court Require Dismissal of Appellant's Complaint Since the Shipping Act, 1916, Provides Exclusive Remedy for Wrongs Alleged

This Court has repeatedly required dismissal of complaints seeking remedies under the antitrust laws for wrongs based on violations of a regulatory statute and for which the statute provides sanctions and administrative remedies. The Shipping Act cases are classic examples. In *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), the plaintiff sought an injunction under the antitrust laws against an alleged unfiled agreement between steamship companies to charge "dual rates", *i.e.*, rates lower for shippers signing exclusive patronage contracts than for other shippers.[15] The Court held that the complaint must be dismissed because the Shipping Act provided the exclusive remedy for the wrongs alleged (*Id.* at 485-86). The Court specifically rejected the contention that the antitrust laws applied because the alleged agreement was unfiled and hence the express exemption in Section 15 was inapplicable:

> "But a failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, supra, to afford relief

15. The complaint in *Cunard* like that of Carnation here alleged a variety of wrongs, some of which constituted a violation of Section 14 as well as Section 15 of the Shipping Act. The "dominant facts", according to the Court, were covered by the Shipping Act (*Id.* at 483).

upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside. . . ." (*Id.* at 486).

The *Cunard* case was followed in *Far East Conference v. United States*, 342 U.S. 570 (1952). That case, arising on very similar facts, held that the *Cunard* ruling applied to suits for injunctions against agreements subject to Section 15 brought by the Department of Justice.

The Court has never questioned the holdings of these cases[16] and as recently as 1963 the Court reaffirmed their principle and cited them in its support in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). There, an antitrust suit was brought by the Department of Justice at the instance of the Civil Aeronautics Board, which believed that it lacked power to grant the relief desired. The district court ordered Pan American to divest itself of its stock holdings in Panagra Airlines. The Supreme Court construed the CAB's powers over unfair competitive activities in Section 411 of the Federal Aviation Act (72 Stat. 769 (1958), 49 U.S.C. § 1381 (1958)) as covering the conduct alleged. It then held that the CAB had exclusive jurisdiction to grant the relief sought in the antitrust action.

Activities "affected by an order" of the CAB under sections 408, 409 or 412 (49 U.S.C. §§ 1378, 1379, 1382 (1958)) are the only activities expressly exempted from the anti-

16. Carnation persists in its contention that *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), somehow limits the holdings in *Cunard* and *Far East*. This strained attempt is aptly described by the court below as "entirely fallacious and altogether unsupportable". The circuit court succinctly summarizes petitioner's argument and the reasons why "The *Isbrandtsen* case had nothing to do with the present problem" but rather "dealt solely with the question of the legality of the dual rate system" (R. 168, text and note 12).

trust laws by the Act (49 U.S.C. § 1384 (1958)). There were no such orders. Notwithstanding Congress had thus provided a specific means for obtaining antitrust exemption, the Court properly held that these means were not exclusive and that under the doctrine of supersession of remedies the logic of the statutory scheme and the fact that the CAB could grant relief required dismissal of the antitrust action.[17] In so holding the court stated:

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See *United States Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Far East Conference v. United States*, 342 U. S. 570, 577." (371 U.S. at 313 n. 19)

Reply to Carnation's and Solicitor General's Attempted Rationalization of Cunard-Far East

Carnation argues that *Cunard* and *Far East* lack continuing vitality and that those cases are inapplicable to treble damage actions (Pet. Br. 80-89). The Solicitor General suggests that the *Cunard - Far East* rule can be limited by confining it to suits for injunctions against agreements the Commission might later approve and to treble damage actions in which there is a question whether the agreement is already approved (S.G. Br., 12, 26-31). The possibility that the agency might later approve them would apparently be irrelevant insofar as a treble damage action is concerned.

---

17. It can hardly be contended in the light of *Pan-American* that conduct subject to sections 408, 409 or 412 of the Act but unapproved by a CAB order thereunder would be subject to antitrust remedies simply because the Act specified such orders as a means of obtaining antitrust exemption. The *Pan-American* case involved conduct which would have been subject to sections 408, 409 and 412 had these sections been in existence at the time the conduct began. The Court read section 411 of the Act to cover sections 408, 409 and 412 questions. Therefore, it is inconceivable that *Pan-American* can be read as consistent with Carnation's view that strict compliance with provisions for express exemption is the only time antitrust remedies become unavailable.

This theory would create a new dichotomy between injunctions and treble damages under the antitrust laws which would be contrary to the cases and unsound in principle. Moreover we believe the proffered limitations of *Cunard* and *Far East* are seriously in error respecting the availability of either antitrust remedy to conduct subject to Shipping Act sanctions and remedies.

First, the criteria listed by the Court in *Cunard*, *Far East*, and *Pan American* do not support the Solicitor General's attempted rationalization of those cases as requiring dismissal of treble damage actions only if the Commission decides that any agreements alleged are already approved by the agency. Every factor listed in the three decisions as requiring dismissal of an antitrust complaint is present in the instant case in as great or greater degree: Carnation's complaint alleges wrongs that are violations of the Shipping Act;[18] a remedy was available before the Commission;[19] an appeal of the Commission's orders lies to the Courts.[20] The Act is pervasive or comprehensive in nature;[21] the uniformity of interpretation of the Act demands that the agency decide the questions raised and apply any sanc-

---

18. See 284 U.S. at 483-85 (*Cunard*); 342 U.S. at 574 (*Far East*); 371 U.S. at 305 (*Pan American*).

19. See 284 U.S. at 486 (*Cunard*); 342 U.S. at 574 (*Far East*); 371 U.S. at 309, 311, 312 (*Pan American*). Remedies are discussed *infra* at section II-B-3.

20. See 284 U.S. at 486 (*Cunard*); 342 U.S. at 572 n. 4, 574, 577 (*Far East*); 371 U.S. at 309 (*Pan American*). See Shipping Act, 1916, § 31 (39 Stat. 738 (1916), as amended, 46 U.S.C. § 830 (1958)).

21. See 284 U.S. at 480-81 (*Cunard*); 371 U.S. at 301, 304 (*Pan American*). This topic is discussed in detail *infra* at section II-B-1 and 2.

tions;[22] treble damage recoveries would amount to prohibited rebates;[23] the agency might in the future approve the conduct in question;[24] the agency has the expertise to determine the question raised in the light of the policy of the Act it administers and the dictates of a complex industry.[25] These factors are exhaustively discussed by the court of appeals in applying them to the facts of the instant case (R. 169-186).

Second, the Court has not suggested in the governing cases that supersession of antitrust remedies by remedies and penalties under a regulatory statute may apply to injunctions but not to treble damage actions if the agency might approve the conduct in question. Rather, the Court has looked to the question whether *remedies* and penalties are available. In the *Cunard* case, where the Court considered whether an injunction could be obtained against an unfiled Section 15 agreement, the Court's language referred both to treble damage actions and suits for injunctions. The Court then cited *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), a treble damage case. The *Cunard* decision pointed out that "a remedy" under the antitrust laws no longer exists, since it was replaced by Shipping Act remedies. The decision also stated that Shipping Act Section 22 "orders" by the Commission (which would include reparations

---

22. See 284 U.S. at 482 (*Cunard*); 342 U.S. at 574-75 (*Far East*). Discussed *infra* at section II.

23. See 284 U.S. at 483 (*Cunard*). Discussed *infra* at section II-B-3.

24. See 284 U.S. at 487-88 (*Cunard*); 371 U.S. at 309 (*Pan American*). Discussed *infra* at section II.

25. See 284 U.S. at 485 (*Cunard*); 342 U.S. at 574-75 (*Far East*).

orders) respecting violations of the Act are for the first time open to a judicial proceeding in an action to review those orders (*Id.* at 485-86). Under the Solicitor General's proposed limitation of the *Cunard - Far East* rule, a treble damage action should go forward where, as in those cases, the agreement clearly had not been approved. The Court in *Cunard* nowhere mentioned such a possibility. Rather it used language that in unqualified terms rejected applicability of the treble damage remedy on grounds of the policy enunciated in the *Keogh* decision:

> "If a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. 'Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.'" (*Id.* at 483)

Notably also, the policy grounds given would require the conclusion that the treble damage remedy is superseded by Shipping Act remedies even if there is no possibility that the agreement in question may be approved.

Third, the Solicitor General and Carnation, relying on *United States v. Borden Co.,* 308 U.S. 188 (1939), argue Congress intended that antitrust exemption be obtained under Section 15 of the Shipping Act only by literal compliance therewith. That position is wholly inconsistent with the position that *Cunard* and *Far East* properly apply supersession to require dismissal of a suit for an injunction alleging an unapproved agreement but not a suit for treble damages. The fact that *Cunard* and *Far East* require an exception to the Solicitor's interpretation that compliance with the express exemption provides the only basis for a

dismissal of antitrust actions shows that this Court has emphatically rejected this approach.

Fourth, there is an entirely rational reason why Congress made an express exemption for approved agreements but not for unapproved agreements. Since by the time the Shipping Act was passed the doctrine of primary jurisdiction and supersession of remedies was firmly established, it was not necessary for Congress to provide express exemption from the antitrust acts for acting under unapproved Section 15-type agreements. That exemption was accomplished by providing remedies and penalties in the Shipping Act. By contrast it *was* necessary to include an exemption *after* approval because once the agreement is approved, it no longer constitutes a violation of the Shipping Act and there is, accordingly, no penalty or remedy provided which would supersede the antitrust remedies. The approved agreement might still, without more, be in violation of the antitrust acts. As a corollary, therefore, in order to avoid any conflict it was considered necessary to include the specific exemption for approved agreements.[26]

Further, the specific grant of exemption from the antitrust laws contained in Section 15 hardly leads to the

---

26. The same reasons apply with even greater force to the 1961 amendment to Section 15 (*supra*, n. 13) adding agreements approved under new Section 14b (75 Stat. 762 (1961), 46 U.S.C. § 813a (Supp. V, 1964) (hereinafter, "Section 14b")) to the express exemption from the antitrust acts. Supersession was not only thoroughly established by the courts but vigorously called to the attention of the Committees considering the Act by the Chairman of the then Federal Maritime Board (see section II-A-2, *infra*). Accordingly, there is no merit to Carnation's suggestion that the 1961 amendments by including agreements under Section 14b within the express antitrust exemption somehow constitute a rejection of the supersession doctrine (Pet. Br., pp. 41-42).

conclusion that the antitrust laws apply to agreements violative of the section because unapproved. There is no indication in the legislative history that Congress intended such a result. It would be strange moreover to conclude that antitrust remedies are inapplicable to conduct subject to sections of regulatory statutes that do not mention the antitrust laws, but that antitrust remedies do apply where Congress provides an exemption. Such a result, absent some congressional expression that the antitrust laws would continue to apply, would mean that in the very instance where Congress thought antitrust concepts inappropriate they might be applied, and that in the situation where Congress did not advert to the question a court may invoke the doctrine of supersession of remedies.

If, for example, an antitrust complainant alleges that a defendant gave rebates illegal under Sections 14 or 16 of the Shipping Act, neither of which refers to the antitrust laws, the complaint must be dismissed as raising Shipping Act questions falling within the jurisdiction of the Commission, *Maddock & Miller, Inc. v. Mayer China Co.*, 241 F. Supp. 306 (S.D. N.Y. 1965). See, *e.g.*, *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); *Terminal Warehouse Co. v. Pennsylvania R. R.*, 297 U.S. 500 (1936). Why should the result be different if a plaintiff alleges that rates are set pursuant to an unfiled Section 15 agreement? The *Cunard* case holds that there is no difference (see 284 U.S. at 486).

Fifth, the Solicitor's rationale is based on the erroneous assumption that the sole reason for the *Cunard - Far East* rule is avoidance of different, *i.e.*, conflicting, results by court and agency. But this is but one of many reasons given by the Court—reasons that ranged from legislative intent to protection of the uniformity of the rate structure and

avoidance of illegal preferences and rebates in the form of antitrust recoveries or settlements.

Sixth, assuming that the danger of a clash of court and agency were the sole criterion, we point in detail to the clash of Shipping Act and antitrust policy in section II-A below and to the practical procedural conflicts resulting from Carnation's and the Solicitor General's theories in section II-B-2 below. However, in passing, we emphasize that a treble damage award, more than an injunction, provides the opportunity for such a clash. A treble damage award is irreversible and can have devastating impact, particularly in an industry such as shipping that has required subsidy and other governmental aid by the United States and foreign governments merely to remain in existence.[27] An injunction against conduct that may be approved and removed by statute from the dictates of the antitrust laws may readily be vacated upon a showing to the court that the basis for its injunction no longer exists either because an enjoined agreement has received Commission approval or because a new agreement has been filed and approved.

With respect to the agreements the Commission did find to exist as unapproved Section 15 agreements, *i.e.*, concurrence machinery and placement of items on the initiative list, the Commission may very well approve them when

---

27. In 1961 when the House Committee on Merchant Marine and Fisheries rejected a Justice Department sponsored amendment to Section 15 that would have made antitrust remedies applicable to unfiled Section 15 agreements, Representative Tollefson in attacking the measure referred to the vast sums involved in the *General Electric* litigation and expressed the view that Shipping Act penalties were more than ample. The Justice Department proposal was scuttled, never to reappear until issuance of the Solicitor General's Brief in this case (see Hearings Before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Cong., 1st Sess. (1961) 470-71) (Discussed *infra* at section II-A-2).

they are formally filed. This is the very situation that existed in *Cunard* and *Far East*, where the dual rate agreements had not been presented to the Commission for assessment under Shipping Act standards. The same danger exists here as in *Cunard - Far East:* An antitrust award could precede Commission approval of the very agreements on which the antitrust award was based.[28] This was the situation that caused the Court in *Pan American* to state that it would be "strange, indeed" for an antitrust cause of action to exist for conduct that might subsequently be approved by the agency (371 U.S. at 309).

Seventh, it is the injunction cases which extended the supersession doctrine developed by the treble damage cases, not the reverse. The injunction cases were preceded by and their principles arise from decisions dealing with court suits for damages, first under common law causes of action and later under the antitrust laws (*e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922)). In the *Keogh* decision it was held that the remedy for injury resulting from unreasonably high rail rates set pursuant to an allegedly illegal conspiracy was reparations before the Interstate Commerce Commission and not a treble damage action under the antitrust laws. The *Keogh* decision, relied on in *Cunard*, shows the Solicitor General's rationale to be out of step with the supersession decisions and the reasons for these decisions. No possibility existed in *Keogh* that the conspiracy or agreement had received ICC approval. Indeed, the ICC had no express power to approve the conduct or to exempt it from the antitrust laws. The case rested on the Court's view of authorities such as the *Abilene* case

28. Assuming, of course, that an antitrust award would be proper in any event to punish carrying out the agreements the Commission found to exist.

and its view that a treble damage action would disrupt the administrative scheme set up by Congress. The same grounds governed the *Cunard* decision, which rested heavily on *Keogh* for support. It is also significant that by the time *Cunard* extended the supersession of remedies doctrine of *Keogh* to injunctions it was firmly established that the existence of administrative reparations required dismissal of treble damage actions.

Decisions of this Court and of the lower courts rendered since the *Cunard* case further stress that a proper accommodation of regulatory statutes and the antitrust laws more strongly requires dismissal of treble damage actions than suits for injunctions. In *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), Georgia brought an original action in the Court seeking both treble damages for and an injunction against an alleged rate fixing conspiracy by railroads. The resulting rates allegedly discriminated against the Southern States. The Court held that the suit for treble damages would not lie, relying on the *Keogh* case, but declined to dismiss that part of the complaint that sought an injunction because the particular relief sought was "not a matter subject to the jurisdiction of the [Interstate Commerce] Commission." (324 U.S. at 455).

In *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936), the railroad and Merchants Warehouse Co. operated under a preferential agreement. Terminal, a competitor of Merchants, obtained a cease and desist order from the ICC against the agreement, but was rebuffed in its claim for reparations against the railroad on the ground that it had not demonstrated actual loss. The ICC, however, had undoubted power to award reparations in an appropriate case. Terminal then sought antitrust treble damages both against the railroad and against Merchants. Reparations might also have been sought from Merchants

before the ICC, but Terminal, like Carnation here, failed to pursue that course. This Court held that the antitrust treble damage complaint should have been dismissed as to both the railroad and Merchants, since the antitrust violation was also a forbidden discrimination under the Interstate Commerce Act. In a statement that comes close to describing the instant case, the Court summarized:

> "Every act of wrongdoing proved in the new suit [antitrust activities] to have been committed by the defendants was proved against them also (with unsubstantial exceptions) in the case before the Commission." (*Id.* at 509).

The Court pointed out that treble damage recoveries against persons subject to the Interstate Commerce Act would amount to illegal rebates unavailable to competitors of the plaintiff (*Id.* at 512). The Court reasoned: A suit for an injunction under the antitrust laws is inconsistent with the provisions for cease and desist orders under the regulatory statute since the availability of antitrust injunctions would break down the unity of the regulatory system. Of great significance here, the Court then concluded: "The same considerations" apply "with undiminished force, where the suit under the Clayton Act is not for an injunction but for damages." Mr. Justice Cardozo then stated:

> "Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. *If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce*

> *Act like the Shipping Act embodies a remedial system that is complete and self-contained.* It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion." (*Id.* at 514-15).

To return to the specific context of the Shipping Act, a question identical to that now before the Court arose in *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 222 F.2d 369 (2d Cir. 1955), *adopting opinion in* 126 F. Supp. 91 (S.D.N.Y. 1954). A complaint seeking treble damages under the antitrust laws for a conspiracy embodied in an allegedly unfiled Section 15-type agreement was dismissed. The same attempt was made to distinguish the *Cunard* and *Far East* cases on the basis that they involved injunctive actions. Like the court of appeals and the district court in this case, the Second Circuit rejected this distinction. Decisions in a number of other cases in the lower courts also conclude that the remedies under the Shipping Act are exclusive and preclude antitrust actions.[29]

---

29. *Rivoli Trucking Corp. v. New York Shipping Ass'n*, 167 F. Supp. 940 (S.D. N.Y. 1956); *Rivoli Trucking Corp. v. New York Shipping Ass'n*, 167 F. Supp. 943 (S.D. N.Y. 1957); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D. Wash. 1952). See *Swayne & Hoyt v. Kerr Gifford & Co.*, 14 F. Supp. 805 (E.D. La. 1935); *Wisconsin & Mich. Transp. Co. v. Pere Marquette L.S.*, 67 F.2d 937 (7th Cir. 1933); *United States v. Borax Consolidated, Ltd.*, 141 F. Supp. 396 (N.D. Cal. 1955).

Eighth, the Solicitor General seeks to support the proffered limitation of *Cunard-Far East* by showing that it would further the purpose of the Shipping Act to provide additional treble damage remedies once the Commission had determined particular agreements to be unfiled. This view overlooks the fact that present remedies for carrying out unapproved agreements are fully adequate and are coupled with statutory penalties of unusual severity (see *infra,* section II-B-3), it fails to recognize that reparations are consistent with the Act's requirements of uniform treatment of all shippers and treble damages are inconsistent with these requirements, and it ignores the fact that the Commission takes the position that it will not accept for filing "routine" agreements merely implementing approved agreements.[30] Minutes of the supplementary agreements found by the Commission to exist in this case had been filed for informational purposes, but not for approval.[31] The antitrust club or "weapon" would result in deluging the Commission with the very "routine" agreements it has stated by rule[32] that it does not wish filed. Thus, the antitrust club proposed by the Solicitor General would create conflict either by requiring the Commission to accept *all* agreements for filing, contrary to its present rules and desires, or to relegate parties to such agreements to constant antitrust attack.

The suggestion that a new weapon is needed to aid the present energetic Commission in enforcing the Shipping Act is a suggestion properly to be made to Congress, not the Court. This the Department of Justice did in 1961 only to be rebuffed. Congress rejected statutory language that

---

30. For further discussion see section II-B *infra.*

31. 6 SRR at 104, 106.

32. FMC Regulations for Filing Copies of Agreements Under Section 15, Shipping Act, 1916, 46 CFR § 522.6.

would have achieved this result, expressing the view that this had never been the law and was thoroughly undesirable (see *infra*, section II-A-2). Having failed to persuade Congress of the necessity for applying antitrust sanctions for violation of Section 15, the Department of Justice here asks the Court to accomplish this result.

The Solicitor General speaks of adding the punishment of treble damages to Section 15 sanctions and remedies, but his proposal does not rule out the additional "weapon" of criminal prosecution under the Sherman Act with attendant massive fines and possible jail sentences. This attempt to subject the ocean carriers to all of these additional penalties and sanctions flies directly in the face of the fact that Congress in 1961 *reduced* Section 15 penalties to "not more than" $1,000 per day because Congress was convinced that the old penalty was too severe, that Section 15 violations represent a wide range of culpability and that the $1,000 per day should be the maximum.[33]

Ninth, the Solicitor General's view is that where conduct may "later be filed and approved by the Commission" (S.G. Br., 12) injunctive relief under the antitrust laws may not be granted. Even this admission misses the central point of *Cunard* that Shipping Act remedies *replace* antitrust remedies. This position is confirmed by the policy, the logic and the wording of the Shipping Act, discussed *infra*, section II. *Cunard* and the policies enunciated therein require the conclusion that supersession of remedies applies whether or not the agency might later approve the conduct.

---

33. 75 Stat. 763 (1961), 46 U.S.C. § 814 (Supp. V, 1964). See H.R. Rep. 498, 87th Cong., 1st Sess. 21 (1961):

> "Past experience has indicated that specific instances of violations of section 15, like instances of violations of other statutes, present wide ranges of culpability. We therefore believe that the penalty provision of this section should be stated in terms of a maximum rather than a fixed amount."

Tenth, the Solicitor General's position that the treble damage remedy exists in addition to Shipping Act penalties and remedies, even if accepted, is inapplicable in this case because the Commission found that the conduct complained of violated Section 16 of the Act. Section 16 prohibits subjecting shippers to "undue or unreasonable prejudice or disadvantage." (46 U.S.C. § 815 (1958)) The question presented is therefore exclusively a Shipping Act question (*e.g., Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156 (1922); *Terminal Warehouse Co. v. Pennsylvania R.R.,* 297 U.S. 500 (1936)).

Borden, Socony-Vacuum and Great Northern Cases Inapplicable

Two cases are particularly stressed in the briefs of Carnation and the Solicitor General, *United States v. Borden Co.,* 308 U.S. 188 (1939) and *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Reliance on these cases is misplaced, since they are not in point. Both cases involved criminal actions under the antitrust laws. In neither case was the agreement in question required to be filed for approval with the agency in question; correspondingly, there were no sanctions and remedies applicable upon failure to file. In neither case could the agreement in question conceivably have been filed and approved. In *Socony-Vacuum,* the statute providing a possible antitrust exemption had ceased to be operative for some years, and the conduct that was the subject of the antitrust prosecution continued long after the statute had terminated. In *Borden,* the agreement was not the type that could qualify for the statutory exemption from the antitrust laws, since the Secretary of Agriculture was not a party to the agreements in question.

Carnation also continues to rely heavily on *Great Northern Ry. v. Merchants Elevator Co.,* 259 U.S. 285 (1922).

The contention (Pet. Br., p. 28) is that the instant case, like *Great Northern,* is a simple overcharge question. *Great Northern,* however, could hardly be less applicable to this case. *Great Northern* involved no accommodation of antitrust and regulatory statutes; it involved no problems of prejudicial conduct under the regulatory act; the complaint there raised no questions for the administrative body to decide. *Great Northern* involved only the question whether one rail tariff item or another applied to a particular shipment. This was a question traditionally for the courts and of no concern to the Interstate Commerce Commission. The instant case is manifestly in an entirely different category.

II. Congress Intended Shipping Act Remedies to Supersede Antitrust Remedies

A. LEGISLATIVE HISTORY DEMONSTRATES SHIPPING ACT REGULATORY SCHEME INCONSISTENT WITH PRIVATE TREBLE DAMAGE ACTIONS

The Solicitor General has come forth with the novel suggestion that Congress intended to permit the treble damage remedy as a useful weapon in enforcing the Shipping Act, particularly as to agreements determined by the Commission to be within Section 15 and which have not been approved. This purported congressional intent is derived solely from the express exemption under Section 15 for approved agreements (S.G. Br. pp. 15-18). There is nothing in the legislative history to support this view.

1. Objectives of Sponsors of the Shipping Act, 1916

We are not aware of any single statement in the legislative history of the Shipping Act, 1916, which can be quoted as representing the views of the 1916 Congress on the narrow problem now before the Court: Do treble damage antitrust remedies apply, in addition to Shipping Act remedies and penalties, to conduct violative of Section 16 of the Act and to agreements violative of Section 15 of the

Act which may later be approved by the Commission? The legislative history shows, however, that the Act's sponsors believed that they had opted against the antitrust laws, replacing antitrust abhorrence of price fixing with a pervasive regulatory scheme founded on the contrary assumption that rate fixing was necessary and desirable. A fair reading of the legislative history as a whole points strongly to the conclusion that allowance of treble damage actions under the facts in this case would be violative of congressional intention. This intention is confirmed—with specific reference to the question in this case—by the legislative history of the 1961 and 1964 amendments to Section 15.

It is clear from the legislative history that the 1916 Congress was deeply concerned with the basic question whether antitrust concepts should be applied to steamship conferences or whether a radically different philosophy should prevail. This concern is reflected in the 1912 enabling resolutions authorizing the investigation that led to the Shipping Act, in the fact that the House Committee on Merchant Marine and Fisheries considered material furnished by the Department of Justice respecting antitrust actions brought against certain ocean carriers, in the report of the House Committee (the "Alexander Report", named after the Committee Chairman), and in a statement by Representative Alexander himself.[34]

---

34. The enabling resolutions, H.R. Res. 425 and H.R. Res. 587 (62d Cong., 2d Sess. (1912)), are set forth in House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American and Domestic Trade Under H. Res. 587, H.R. Doc. No. 805, 63d Cong., 2d Sess. 8-9 (1914) (hereinafter "Alexander Report"). The Alexander Report discusses the question with particularity at pages 416-17. The materials furnished by the Department of Justice to the Committee related to *United States v. Prince Line, Ltd.*, 220 Fed. 230 (S.D.N.Y. 1915), and *United States v. Hamburgh-American S.S. Line*, 216 Fed. 971 (S.D.N.Y. 1914); see Senate Comm. on Commerce, Index to the

The Alexander Report concluded that the antitrust laws should not apply to agreements between steamship lines, that to apply the antitrust laws would either cause dislocative rate wars and destructive competition or lead to consolidation through common ownership, either course ending in monopoly. The Committee found that regularity of service and adequate investment in an industry with high fixed costs required an end to rate wars; that conference rate-making leads to stable rates that allow shippers to predict the cost of ocean carriage when making sales contracts abroad; that inter-carrier rate agreement reduces the likelihood of charging unremunerative rates designed to drive out weaker carriers; that such rate agreement helps eliminate preferential or discriminatory rates, providing uniform rates for all shippers regardless of size and power; that conference rate-making helps maintain a parity between rates from the U.S. and rates from other countries to a common destination; that the conference system eliminates wasteful competition; and, that conference rate-making agreements enable costs of service to be distributed more economically over the traffic available.[35] These advantages would be lost if the antitrust laws were to apply.

As Representative Alexander stated on the floor of the House in explaining the regulatory provisions of the Shipping Act, his committee was

> ". . . confronted with the question whether or not we should recognize the agreements existing between car-

Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. 206 (1962), hereinafter "Legislative Index". The statement by Representative Alexander is quoted *infra*.

35. Alexander Report, *supra* note 34, at 293-302, 416-17. The recommendations in the Alexander Report were adopted by the reports of the House and Senate committees reporting the legislation in 1916. (See H.R. Rep. 659; S. Rep. 689, 64th Cong., 1st Sess. (1916))

riers by water or recommend that the Sherman antitrust law should be enforced against them. . . .

"After giving thorough consideration to this grave question . . . we concluded that many of the provisions of the agreements under which combinations were operating were not objectionable; and hence we recommended reasonable regulation rather than that the combinations might be broken up." (53 Cong. Rec. 8077 (1916))

The congressional assumption that passage of the Shipping Act represented a choice between the antitrust laws and the philosophy favoring conference agreements is reflected in the writing of the early commentators, Johnson and Huebner. They state:

"Having discovered that such relations between ocean carriers are general throughout the greater part of the maritime world, Congress wisely decided that the Sherman Antitrust law should not apply in the future.

• • •

"The act wisely substituted the policy of regulating conference arrangements for the previous policy of prohibition under the federal antitrust laws."

(Johnson & Huebner, *Principles of Ocean Transportation* 385-86 (1919))[36]

The Alexander Committee and Congress believed that application of the antitrust laws to inter-carrier agreements was rejected in favor of regulation of those agreements.

---

36. They also state:

"Recent legislation has radically changed the policy of the government concerning the regulation of shipping.

• • •

"Among the features of recent legislation intended to aid shipping are the control of ocean conferences by the Shipping Board, the suspension of the Sherman Act as regards ocean conferences, agreements, understandings and arrangements . . . ." (*Id.* at 426)

Congress did not believe the regulatory approach, which was based on the assumption that agreements between carriers were desirable and should be continued under government supervision, was consistent with the antitrust approach which assumed that the same agreements were inherently evil. There is no mention anywhere in the legislative history of any continuing application of antitrust remedies to matters entrusted by the Act to the regulatory agency.[37] There is no suggestion that conduct violating the Act thereby becomes subject to the antitrust laws.

Had Congress believed that antitrust sanctions and remedies were applicable to unapproved agreements, or that these sanctions and remedies were properly applicable to enforce compliance with the Shipping Act, Congress would hardly have found it necessary to *require* filing of intercarrier agreements subject to Section 15 and to make failure to file them subject to sanctions and remedies under the Act. Rather, it is reasonable to assume that Congress would have done as it did in the Reed-Bulwinkle Act, 62 Stat. 472 (1948), 49 U.S.C. § 5b (1958), the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (1937), 7 U.S.C. § 608b (1958), and the National Industrial Recovery Act, 48 Stat. 195 (1933): make filing of agreements voluntary, but exempt those approved by the administrative body from the antitrust laws. In those situations, it is obvious that unapproved agreements remain subject to the antitrust laws. See, *e.g., United States v. Borden Co.,* 308 U.S. 188 (1939); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

---

37. See *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 304 (1963), where the Court examined the legislative history of the Civil Aeronautics Act and gave the following as a reason for concluding that the antitrust laws were displaced: "No mention is made [in the legislative history] of the Department of Justice and its role in the enforcement of the antitrust laws . . . ."

The 1916 Congress carefully studied the entire question of proper public policy toward inter-carrier agreements to fix ocean freight rates. Congress determined that the needs of our foreign commerce and the peculiarities of the ocean transportation industry required a national policy favoring these agreements and that application of the antitrust laws would be harmful for the industry and for our commerce. To guard against abuses, Congress insisted that such agreements receive governmental supervision and that they be tested by stated, non-antitrust criteria. It is wholly consistent with the national policy to require that agreements be filed and approved. It is entirely proper that sanctions are provided to ensure filing and compliance with the standards of the Act. But to judge agreements, particularly agreements that the agency might have approved or has not yet tested under the standards of the Act,[38] by the very antitrust concepts that Congress rejected would be to take an entirely inconsistent approach, to subject the agreements to inapplicable criteria, and to defeat the very policy Congress chose to apply to this industry.[39] Moreover, no purpose would be served by subverting the intention of Congress, for Congress provided remedies and sanctions under the Shipping Act that are wholly adequate to ensure compliance with the Act.

---

38. Section 15 does not prevent filing of agreements previously carried out without Commission approval. In the instant case, for example, the Commission's order directed respondents not to carry out supplementary agreements until filed with and approved by the agency.

39. This point is underscored by the instant case. The Commission found that FEC's failure to comply with the terms of an unapproved agreement violated Section 16 of the Act. (Docket 872, 6 SRR at 110)

2. Continuing Policy of Congress That the Shipping Act, Not Antitrust Acts, Regulate Ocean Carrier Agreements

A concise and informative policy statement by the Senate Committee on Commerce in a report accompanying the 1961 revision of the Shipping Act closely parallels the findings and recommendations of the Alexander Report. The Committee stated:

> "Steamship conferences are groups or voluntary associations of ocean common carriers formed so that the members may agree upon rates and certain other competitive practices. Obviously, they do so for the purpose of reducing the rigors of competition which otherwise would exist among the member lines.
>
> "The history of ocean shipping proves beyond peradventure that these competitive rigors are so potentially violent that when unleashed almost invariably they destroy the requisite dependability, regularity and nondiscriminatory nature of ocean common carriage.
>
> "For many years all of the maritime nations of the world, including the United States, have realized that the inevitable monopolistic and discriminatory nature of rate-war competition among the ocean common carriers serving their foreign commerce, justified the formation of conferences so that the carriers may limit or regulate competition between or among themselves. Only the United States imposed over the conference regulatory device a detailed system of Government regulation under the Shipping Act, 1916."
>
> (Senate Comm. on Commerce, Legislative Index, *supra* note 34, S. Doc. No. 100, 87th Cong., 2d Sess. 203 (1962))

Thus, Congress continues to support the objectives of the 1916 legislation, objectives inconsistent with fundamental assumptions of the antitrust laws.

Even more revealing of Congress' continuing policy not to allow the postulates of the antitrust laws to become intermixed with the contrary requirements of the Shipping Act is seen in Congress' rejection in 1961 of Justice Depart-

ment attempts to inject the antitrust laws into Section 15 violations.

As originally drafted, the amendment to the Shipping Act (H.R. 4299, 87th Cong., 1st Sess. (1961)) left the last paragraph of Section 15 providing for penalties for violation of the section unchanged (see Legislative Index, *supra* note 34, at 41, 63). On April 13, 1961, however, draft revision No. 2 was issued (see Legislative Index, *supra* note 34, at 41). It read:

> *"In addition to the penalties provided by the antitrust laws and any other laws,* whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

This wording was identical to that in the draft submitted by the Department of Justice (Hearings Before Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Cong., 1st Sess. 453 (1961); hereinafter, "Hearings"). The Justice Department's purpose in attempting to insert this antitrust language was obviously to provide that violations of Section 15 would also be construed to violate the antitrust laws and thereby to resurrect antitrust penalties and remedies that had been inapplicable since 1916. The very fact that this proposal was made indicates an assumption that without such a provision the antitrust laws were not applicable. But even more significant is the fact that the antitrust provision was roundly criticized and immediately deleted by the House Committee on Merchant Marine and Fisheries. It never again appeared in the several subsequent versions of the amended Section 15.

The Chairman of the Federal Maritime Commission had strongly objected to this language, stating to the subcommittee considering the Shipping Act amendments:

"2. Draft revision No. 2 would expressly make the penalties provided by the antitrust laws and 'any other laws' applicable to any violation of sections 2, 3, and 4 of H.R. 4299, in addition to the penalties established by H.R. 4299 itself (p. 10, lines 8-9; p. 13, lines 23-24; p. 15, lines 11-12).

"We believe that the penalties set forth in the act should be self-sufficient and that there should not be superimposed thereon the additional penalties of the antitrust laws and 'any other laws.'

"Under draft revision No. 2 . . . it might be argued that it means that where a violation of this act is also a violation of the antitrust laws or 'any other law,' the penalties of those laws would be applicable. Who is to adjudicate whether there is a violation of the antitrust laws or 'any other law'? Does this mean that any person is free to challenge the legality of a carrier's or other person's acts, under the antitrust laws or under the law of, say, the State of California, by complaining to a court with jurisdiction to administer those laws? We fear that draft revision No. 2 may erect separate and independent, and possibly conflicting, jurisdiction over shipping matters in other forums besides the Board. Or, if it means that the Board will nevertheless have sole jurisdiction over these matters, it appears to require that the Board would have to administer not only the Shipping Act, but also the antitrust laws and any other laws.

"You will recall that section 15 of the Shipping Act, as it now reads, expressly allows for Board approval of price-fixing agreements and other agreements which violate the antitrust laws. *I do not believe that the antitrust laws can be built into the Shipping Act without introducing irreconcilable inconsistencies.* It was no doubt for this reason, that the Shipping Act in its present form carves out exemptions from the antitrust laws, and preempts the field of shipping by placing it exclusively under the Federal jurisdiction erected in the Shipping Act.

"In short, the language of draft revision No. 2 will invite argument that the legality or illegality of acts regulated by the Shipping Act cannot be determined by the standards of that act alone or by the Board alone, and that such acts must be held illegal if they offend against the antitrust laws, or 'any other law' as well. It implies that State and Federal courts, as well as the Board, have independent jurisdiction over matters covered by the Shipping Act. This is at war with the traditional concept of primary jurisdiction of the Federal administrative agencies, a concept reiterated time and again by the Supreme Court. It is the position of the Board that matters falling within the ambit of the Shipping Act and brought thereby under the jurisdiction of the Board should stand or fall under the standards of that act; that violation of those standards should be punishable by penalties specified in that act; and that the administration of that act should be reposed in one Federal administrative board." (Hearings, *supra* page 36, at 459-60.)[40]

---

40. Although the Senate debate on the 1961 amendments to the Shipping Act did not specifically concern application of the antitrust laws to agreements in violation of Section 15, it did reject a number of amendments designed to insert certain other antitrust concepts into the bill. (See 107 Cong. Rec. 18235-18247 (September 14, 1961); Legislative Index, *supra* note 34, at 388-423) The most carefully considered statement of the majority view on the place of the antitrust laws in the Shipping Act was made by Senator Schoeppel:

"Steamship conferences, first, are voluntary associations of companies which operate ocean common carriers. Bluntly stated, they are cartels whose primary purpose is to limit the competition for ocean freight through agreements to control rates, allocate cargoes, and otherwise. It has long been the almost universal practice for American and foreign steamship lines engaging in ocean commerce to operate under such conference agreements and arrangements, and conference agreements are permitted under U.S. law. They were specifically exempted from the antitrust laws in 1916 following a long and comprehensive investigation by the Congress.

• • •

"The problem we face today is the basic conflict between our traditional antitrust principles and the cartel concept which guides steamship conferences.

"In resolving this conflict, it is essential to bear in mind that the regulation of international shipping is difficult, if not

Members of the subcommittee, before deleting the antitrust language, made abundantly clear their hostility to application of the antitrust laws in any manner to agreements unapproved under Section 15. For example, Representative Tollefson asked Mr. Stakem, the Chairman of the Federal Maritime Board:

> "MR. TOLLEFSON (reading):
>
> In addition to the penalties provided by the antitrust laws and any other laws, whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.
>
> "I am interested in knowing where this language came from.

---

impossible, for any single government to achieve. The foreign commerce of the United States is also the foreign commerce of another nation. At best we could control only one end of the journey, and even then only a minority of the carriers are U.S. citizens or U.S. firms. The testimony of the State Department is compelling in this regard. Furthermore, the history of ocean shipping over the last 100 years shows that there is no happy medium between war and peace, and that rate wars lead to monopoly or to the exposure of American shippers and lines to disastrous competition with foreign shippers and lines. Peace is possible only through the use of conference arrangements and agreements, of which dual rates are often a key element.

"*In the face of these facts, U.S. law for 45 years has exempted steamship conferences from the antitrust laws and substituted instead the restraint of Government regulation specifically designed to take into account of the international character of the industry.* This bill is based on that approach, and it also recognizes that overregulation by the United States will simply result in putting shippers in other areas of the world in a superior competitive position.

"For these reasons, then, I shall support the committee bill. I shall oppose amendments based on our antitrust principles because of the clear showing in our hearings and in the whole history of ocean shipping that they will scuttle the American merchant marine and gravely damage the Nation's foreign commerce." (Legislative Index, *supra* note 34, at 404-405.)

"As Mr. Stakem has said, this makes it possible for the Justice Department to step in, in any case, in a way that it has not been able to do heretofore under the law and under the decisions of the Supreme Court, is that not right?

"MR. STAKEM. I think that is true. We feel very strongly about the inclusion of the antitrust language and the 'any other law' language because I think it waters down the jurisdiction of the Board and does create any number of problems that could be litigated.

"MR. TOLLEFSON. Well, as you have indicated in your statement, there would be two agencies, if I might call them that. You would have the Department of Justice on the one hand and your Board on the other being able to step into any situation where there was a violation and take action independent of each other, and you might even take different action, is that so?

"MR. STAKEM. That is true." (Hearings, *supra* page 36, at 470.)[41]

---

41. Representative Tollefson in the same colloquy exhibited concern over the attitude of and lack of knowledge of international shipping by the Department of Justice:

"MR. TOLLEFSON. I am very much disturbed by this language principally because of the anti-American merchant marine attitude of the Justice Department.

"The Justice Department, quite apparently and quite evidently from its testimony here the other day, indicates that, first, it has no sympathy with the American merchant marine and, second, it does not understand the problem of international shipping at all.

"I suppose I should put in a third one there, that they do not seem to care to know anything about it.

"I would be worried if this language or these penalty provisions remain in the statute. I am very curious to know how they got in the bill.

"MR. STAKEM. I can only say, Congressman Tollefson, that this language did not come from the Federal Maritime Board and I would like to add to that that we have sincerely tried in consultation with the Justice Department to reconcile the views of Justice with the views of the Board and we were not able to reconcile the views, so that I think both of us come before this committee with a full disclosure of feelings on both

What Congress undertook in 1961 was more than a simple amendment to the Shipping Act. Both the language and the philosophy of the statute were reconsidered in extensive hearings. Rejection by the 1961 Congress of application of the antitrust laws to Section 15 agreements and to other aspects of the Shipping Act is most important. First, because Congress expressed its view that antitrust remedies had never applied to agreements required to be filed under Section 15 of the Act. Second, because Congress rejected the position urged here by Carnation and the Solicitor General. Third, because Congress reaffirmed the regulatory postulates of the Shipping Act elaborated by the Alexander Report in 1914.

An additional strong indication of Congressional intention that antitrust remedies not apply to conduct covered by Section 15 of the Act is seen in a 1964 amendment to the section (78 Stat. 148 (1964), 46 U.S.C.A. § 814 (Supp. 1964)). The Commission had reversed all precedent and determined that leases of marine terminal facilities containing competitive restrictions must be approved under Section 15. The lease in the particular case required that the lessee charge rates "competitive with and not greater than charged at other ... ports" (S. Rep. No. 770, 88th Cong., 1st Sess. 2 (1963)). This determination affected many terminal leases of a simi-

---

sides so that this committee can make an informed judgment as to what the course of action should be.

"MR. TOLLEFSON. I have just another question or two.

"Do you feel that there would be ample penalty provisions in the bill if the penalty provisions that you have referred to in your statement on page 4 were eliminated from the bill? Would there still remain ample penalty provisions in the legislation?

"MR. STAKEM. Yes, there would, Congressman Tollefson. I think that, if you eliminated the objectionable language, the bill would have ample—and I am looking for a word—sanctions against any company that violated the act." (Hearings, *supra* page 36, at 470-71.)

lar nature that were unfiled and unapproved by the Commission. These agreements, restricting price competition, were thus in a status similar to the "supplemental agreements" here, now determined by the Commission to be unfiled and unapproved. The Department of Justice instituted numerous suits to recover Section 15 penalties for failure to file the lease agreements, even though some of them had by then been approved by the Commission (see *Id.*, at 4-5).

The threat of substantial Section 15 penalties being applied to persons who in good faith had not filed their agreements moved Congress in 1964 to amend Section 15 by enacting what is known in the industry as the Terminal Lease Amnesty Act. Any leases previously executed which were filed for approval within 90 days of enactment of the Act were exempted from Section 15 penalties. Both the Commission and the Department of Justice supported the legislation (*Id.*, at 6, 9).

As the legislative history shows, many of the unfiled, unapproved leases involved agreement on rates, comparable to agreements alleged by Carnation in this case. But no one, not even the Department of Justice, suggested that the lease agreements might be reached under the antitrust laws. No antitrust suits were brought by the Justice Department, before or after the Amnesty Act, on the theory urged here—that unfiled Section 15 agreements give rise to antitrust actions. The obvious intention of Congress, with the concurrence of the Department of Justice, was to relieve the parties to the leases from any penalties. Yet the Amnesty Act made no mention of the antitrust laws for the obvious reason that this was considered unnecessary in view of the Commission's determination that the lease

agreements were subject to Section 15. If Carnation's and the Solicitor General's position as to express exemption were valid, it would have been essential to include an express antitrust exemption in this amendment to accomplish the purpose of relief from all penalties.

Were the position urged by Carnation or that urged by the Solicitor General here correct, it would mean that those who complied with the Amnesty Act by filing leases with the Commission would still be subject to treble damage or other antitrust action. Certainly this was not Congress' intent in extending "amnesty". Surely, too, the 1964 legislation and its history demonstrate again Congress' continuing assumption that agreements required to be filed under Section 15 are subject to the Shipping Act and the Shipping Act alone.

B. CONGRESS, IN THE SHIPPING ACT, 1916, ENACTED A PERVASIVE REGULATORY SCHEME INCONSISTENT WITH TREBLE DAMAGE ANTITRUST ACTIONS

Whether standards of competitive behavior imposed by a regulatory statute displace the antitrust laws and conduct is adjudged in an administrative rather than a judicial forum depends on congressional intention, on the breadth and coverage of the regulatory scheme and on the extent sanctions and remedies are provided for the particular conduct alleged. When a regulatory scheme is comprehensive or "pervasive in nature", it supplants the antitrust laws to the extent it provides its own standards of competitive behavior and penalties and remedies for violation of those standards. Thus, the Civil Aeronautics Act, which is "a regime designed to change the prior competitive system", supersedes the antitrust laws with respect to unfair methods of competition (*United States v. Pan American World Airlines, Inc.*, 371 U.S. 296, 301 (1962)). By contrast absence of a "pervasive regulatory scheme" is often cited by the Court as a

reason for refusing to find supersession (see *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963); *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959)).

That the provisions of the Shipping Act constitute the *most* pervasive of the regulatory acts, that these provisions comprise a self-contained system with full sanctions and remedies for violations thereof is readily apparent from a reading of the statute. The Shipping Act, 1916, even more than legislation affecting aeronautics is, in the words of this Court,

> "a comprehensive measure bearing a relationship to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (*United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 480-81 (1932))

The Supreme Court has also declared that ". . . the Shipping Act embodies a remedial system that is complete and self-contained" (*Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500, 514 (1936)). The Senate Committee on Commerce in recent hearings emphasized that the United States has imposed on its ocean common carriers in foreign commerce "a detailed system of Government regulation under the Shipping Act, 1916" (Legislative Index, *supra* note 34, at 203). The Shipping Act's pervasive regulatory scheme is reviewed in convincing detail in Judge Pope's decision in the court of appeals (R. 169-173). The Solicitor General does not challenge the pervasive nature of the Shipping Act regulatory provisions. Only Carnation raises any question on this point in arguing certain distinctions between foreign and domestic regulation. We believe that, in the face of the consistent view expressed by the courts

and by Congress that the Shipping Act is a fully pervasive regulatory scheme respecting foreign commerce, there is little to be achieved by detailed discussion of Sections 14, 16, 17 and 22 of the Act or by replying to Carnation's contentions in this regard.

1. Shipping Act Grants Full Power Over Unfair Practices to Federal Maritime Commission

Sections 14, 16 and 17 of the Shipping Act deal with unfair competitive practices and discriminatory or prejudicial treatment of shippers, ports and others. These measures, which together comprise a form of Clayton or Federal Trade Commission Act tailored to the maritime industry, are comprehensive both in the extent of their coverage and in terms of the sanctions available in the event the standards are violated (compare 15 U.S.C. §§ 13-15, 45 (1958)). However, the Shipping Act's particular emphasis on equal treatment by carriers, its requirement of nondiscrimination and nonpreferential rates, its abhorrence of rebating and its requirement that reparations be administratively handled to avoid rebates or other inequality of treatment strongly indicate the conflict that would develop if antitrust remedies were applied to the same conduct for which Shipping Act remedies and sanctions exist.

Section 14 prohibits carriers from paying or agreeing to pay deferred rebates, using "fighting ships", and retaliating or threatening retaliation against shippers who patronize other carriers or file complaints. It also outlaws discriminatory volume contracts and prohibits unfair treatment or unjust discrimination against shippers respecting cargo space and claims.

The essence of the detailed regulation provided in Sections 16 and 17 is to require carriers to extend nonpreferential and nondiscriminatory treatment to their customers

and to the localities they serve. Among other restrictions the carriers are prohibited from providing transportation at less than regular rates or otherwise rebating and are required to provide uniform treatment in handling cargo to and from the ship. A principal effect of these sections is to require carriers to apply their rates uniformly, so that no shippers obtain advantages over other shippers. This policy, reinforced by the requirement in Section 22 that the Commission administer reparations and that penalties for violations of the Act be recovered by the United States rather than the injured party, gives the Commission the role of enforcing equality of treatment by carriers. This role, which is in direct conflict with treble damage recoveries by particular shippers, is emphasized also by the requirement of Section 14 that adjustment and settlement of shipper claims not be discriminatory or unfair.

Complaint Raises Section 16 Issues

Carnation's complaint charged that Carnation was injured by PWC's failure to take independent action on Carnation's rate request, and by the fact that respondents failed to place Carnation's product on the initiative list (R. 19-20). The Commission has now concluded that PWC and FEC violated Section 16 of the Act. PWC violated Section 16 by unreasonably failing to take independent action on Carnation's rate request as it had the right to do under its agreement with FEC. FEC in turn violated Section 16 by failing "to implement fully the terms of the [unfiled] supplemental agreements. . . ." and to concur in placement of Carnation's product on the initiative list (Docket 872, 6 SRR 110). Carnation could have sought reparations which the Commission was obviously willing to grant (*Ibid.* n. 4). The Conferences still face criminal penalties under Section 16.

Under *Keogh v. Chicago & N.W. Ry.* and *Terminal Warehouse Co. v. Pennsylvania R.R., supra,* as well as under the *Cunard* decision, the antitrust complaint must be dismissed, since it raises questions of unreasonable discriminatory treatment reserved for the Commission's decision under Section 16. Thus, in *Cunard,* the Court, in dismissing the complaint, pointed out that the allegations of the complaint

> "... either constitute direct and basic charges of violations of these provisions [Sections 14, 15, 16 and 17] or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws." (284 U.S. at 485)[42]

There is no contention here that allegations raising violations of Section 16 are not exclusively for the Commission's determination.

The above cases point out that statutes regulating the transportation industry stress uniform treatment of shippers, ports and products. It is particularly anomalous, therefore, to give a treble damage remedy to a shipper who is subjected to "prejudice" or "disadvantage" even if the treble damage complaint does not on its face state the prejudice with specificity. The theory of reparations, carefully supervised by one agency, is that the prejudice or discrimination is erased and the shipper restored to competitive equality vis-a-vis other shippers. Penalties, therefore, are paid to the

---

42. In *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350 (1963), the Court pointed out that unlike the Comptroller of the Currency, the CAB,

> "... had been given broad powers to enforce the *competitive standard clearly delineated by* the Civil Aeronautics Act [so that] ... the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers ...."

(See also *United States v. Radio Corp. of America,* 358 U.S. 334, 339 (1959))

United States, not the shippers. Treble damages, on the other hand, destroy uniformity of treatment of shippers and jury awards will vary in each case. As stated in *Cunard:*

> "[I]f a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. 'Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.'" (284 U.S. at 483; see *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907))

2. Section 15 Vests Full Authority Over Agreements Limiting Competition or Fixing Ocean Rates in Federal Maritime Commission

Section 15 of the Shipping Act embodies the central core of that part of the Act that creates "a regime designed to change the prior competitive system." (*Pan American World Airways, Inc. v. United States, supra,* 371 U.S. at 301)[43] Section 15 is directly concerned with a matter that is at the heart of antitrust doctrine: inter-competitor agreement on prices. Section 15 requires carriers and other persons to file with the Commission copies of all agreements, conferences or understandings with other carriers or other persons "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special

---

43. "With respect to ocean transportation, however, Congress from the beginning chose to exempt agreements among carriers and between carriers and shippers from the antitrust laws. They thus rejected court determined competition and preferred to rely upon regulation under an expert administrative agency." (*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 513 (1958), Frankfurter, J., dissenting on another ground; see majority opinion to same effect at 489-91.)

"It thus seems evident that Congress has set up a standard for the shipping business quite different from that applicable to trade agreements affecting business on land." (*United States Nav. Co. v. Cunard S.S. Co.*, 50 F.2d 83, 88 (2d Cir. 1931), *aff'd*, 284 U.S. 474 (1932)).

privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential or cooperative working arrangement." (46 U.S.C. § 814 (1958)) Agreements approved by the Commission are specifically excepted from the antitrust laws.

That filing of Section 15 agreements is required rather than permissive indicates that carrying out unfiled agreements is a Shipping Act, not an antitrust question. The counterpart of Section 15 in the Interstate Commerce Act provides merely that carriers "may . . . apply to the Commission for approval of the agreement. . . ." (49 U.S.C. § 5b (1958)) Unlike the Shipping Act, there are no penalties for failure to file, and no basis exists for reparations to injured parties. Agreements approved are exempted from the antitrust laws, but, consistent with the voluntary nature of section 5b, the legislative history shows that the antitrust laws continue to apply to unapproved agreements (see 1948 *U.S. Code Cong. & Ad. News,* 1844, 1848). There is, of course, no such indication with respect to the Shipping Act.

Another indication that the antitrust laws do not apply to unfiled Section 15 agreements or agreements beyond the scope of a filed agreement is that Section 15 states that the Commission "shall approve" all agreements that it does not find to fall into specific prohibited categories. The Shipping Act alone provides the standard by which such agreements may be disapproved: *i.e.,* those that are "unjustly discriminatory or unfair" or those that "operate to the detriment of the commerce of the United States" or those that violate other provisions of the Act (46 U.S.C. § 814 (1958)).

The language of the section favoring approval of these agreements limiting price competition and contemplating approval of agreements previously unfiled with the Commission suggests that Congress did not intend these agreements to be subject to antitrust attack on the grounds that they are unfiled. The statute in effect recognizes the problem (discussed *infra*) of the great difficulty of knowing whether or not an approved agreement includes subsequent action taken by the parties to implement the agreement. Section 15 resolves that problem by providing that if carriers—or the Commission by informal advice—guess wrong, an agreement that should have been filed but was not may still meet the statutory criteria and be approved. The Commission will consider the merits of unfiled agreements in a future proceeding. It should have the opportunity to do so. The supplementary agreements carrying out approved Agreement 8200 may well be the inherently desirable type of agreement that the Commission is directed to approve. These agreements should not be subjected in the interim to a crushing antitrust assault.

As stated in the *Pan American* case, "it would be strange, indeed," if actions "which met the requirements of the" regulatory statute "were held to be antitrust violations" (371 U.S. at 309). "It would also be odd to conclude that" a matter that could pass muster before the administrative body "should run afoul of the antitrust laws." (*Ibid.*) The Court continued:

> "Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review . . . ." (*Ibid.*; see *United States v. Radio Corp. of America, supra*, 358 U.S. at 347 n. 16.)

The circumstances of the instant case suggest an additional and serious danger inherent in failing to dismiss antitrust complaints alleging injury from rates set pursuant to unfiled Section 15-type agreements. The difficulty in knowing what agreements need be filed and what sub-agreements are included within the scope of approved agreements strongly suggests the wisdom of allowing the administrative agency with its expertise to handle such questions within the administrative framework. Not all agreements literally falling within the terms of Section 15 need be filed with the Commission. Indeed, the Commission refuses to accept for filing "routine arrangements for carrying out authorized agreements" though these "may be received as information." (46 C.F.R. § 522.6; see Section 15 Inquiry, 1 U.S.S.B. 121 (1927))

The difficulty of determining which agreements need be approved by the agency and which are "routine" is further indicated by the Commission's proposed rule-making in its Docket No. 876 (see 25 Fed. Reg. 359 (Jan. 15, 1960)):

> "The term 'agreement' does not include routine, day by day activities under the plan or program which is provided for under the express language or reasonably intendment of such language of a previously approved section 15 agreement: such as (but not limited to) the adoption of tariffs of rates . . . and rules and regulations pertaining thereto . . . adopted by the parties pursuant to an approved section 15 agreement."

This proposed rule has never become final, doubtless because it only promotes confusion. The Commission has preferred to treat Section 15 filing questions on a case-by-case basis.

Every conference agreement is in one way or another an agreement to agree further. It is evident that if the courts are to entertain antitrust actions alleging unfiled agree-

ments, it is always possible for the plaintiff to allege an agreement that exceeds the scope of the approved agreement, thereby injecting the courts into questions that are for the Commission to determine.

The decisions of the Commission have demonstrated the quandary in which parties to agreements find themselves when the Commission makes new standards in a specific case applicable retroactively to others similarly situated. *Agreements Nos. 8225 and 8225-1 Between Greater Baton Rouge Port Commission and Cargill, Inc.*, 5 F.M.C. 648 (1959),[44] which for the first time encompassed terminal leases within the ambit of Section 15, is a classic example. Docket 872, here, is another example. In finding that "supplemental" agreements (which had been filed for information) were beyond the scope of Agreement 8200, the Commission said: *"Although not articulated in past cases, we are of the opinion that the applicable test here* is whether or not the Agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place" (6 SRR at 105).

With such constantly changing ground rules the proposal of the Solicitor General to subject parties to the antitrust laws when the Commission determines the agreement should previously have been filed, is fundamentally unfair. This is the very type of situation which Congress believes may well merit only minimum penalties (see note 33, *supra*).

Many other practical problems arise if the settled doctrine of the *Cunard* case that, "the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws" is jettisoned (*United States Nav. Co. v.*

---

44. *Aff'd*, 287 F.2d 86 (5th Cir. 1961), *cert. denied*, 368 U.S. 985 (1962).

Cunard S.S. Co., supra, 284 U.S. at 485). The practical problems arising in the absence of this doctrine include:

The Double Recovery Problem

Assume Carnation had sought reparations from the Maritime Commission as well as treble damages in the courts, and the Commission determined that there *were* violations of the Shipping Act and awarded reparations. Would Carnation be barred from further recovery on its antitrust theory or would respondents be subject not only to conflicting statutory schemes but double recoveries as well? The same problem exists if the Court grants treble damages and the Commission is then asked for reparations. And does not the same problem exist with respect to the cumulative penalties under both statutes?

The Res Judicata Problem

Under Carnation's theory, which assumes that a plaintiff can begin an action before a court, the agency, or both, it is unclear whether the decision of the first forum to reach the finish line must be accepted by the second forum, be it court or agency. Each forum may well have its own view of the facts, the policy applicable thereto, the culpability, if any, of defendants, and whether to grant a remedy. The *Cunard-Far East* rule avoids this problem.

The Sound Administration of Justice Problem

Assume, as here, plaintiff sought recovery only before the court. If the question whether an agreement alleged had been approved by the Commission and specifically exempted by the antitrust laws were referred to the Commission for decision, as suggested by the Solicitor General, is it sound policy or intelligent administration of justice to bring the Commission into the case to resolve this important substantive issue under Shipping Act standards but

then have the courts apply penalties and damages pursuant to entirely different legislation founded on wholly inconsistent basic economic assumptions?

Choice of Remedies Problem

Assume that both Shipping Act *and* antitrust remedies are available to plaintiff, but plaintiff must elect between them. Should it be the choice of a private litigant whether the reparations procedure of the Shipping Act or the treble damages provided by the antitrust laws are applied to particular conduct? Is not Congress' provision for sanctions under the Shipping Act an indication that these measures are to be used?

Given the difficulty of determining what agreements need be approved by the Commission and the ease of alleging that a given agreement was not approved, it seems infinitely more consistent with Congress' policy in enacting the Shipping Act that the entire question, including violation of the Act and the consequences thereof, be handled under the Shipping Act.[45]

3. Federal Maritime Commission Has Full Power Over Violations of Shipping Act, Subject to Judicial Review

None of the administrative schemes is so all-inclusive with respect to the remedies and sanctions for violation of the regulatory standards as the Shipping Act.

Unlike the Interstate Commerce Act, the Motor Carriers Act and statutes regulating aviation, which expressly "save" other remedies,[46] the Shipping Act contains no sav-

45. This is particularly so since the Commission may in a given case determine to give its stamp of approval to the agreement or may, as here, defer approval for a subsequent proceeding.

46. See Interstate Commerce Act, Part I, §§ 9, 22, 49 U.S.C. §§ 9, 22 (1958); Interstate Commerce Act, Part II, § 216 (j), 49 U.S.C. § 316(j) (1958); Federal Aviation Act § 1106, 49 U.S.C. § 1506 (1958); *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

ing clauses; its remedies and sanctions were intended to be complete and exclusive. Unlike the Interstate Commerce Act,[47] the filing of rate-making agreements such as those alleged by Carnation herein is mandatory rather than voluntary, and failure to file subjects participants to a heavy penalty. Violators of Section 15 or of other sections of the Act are subject to administrative cease and desist orders. The Commission may also award reparations to parties injured by violations.[48] Importantly, all final orders of the Maritime Commission are subject to judicial review.[49] By contrast, reparations are never available to injured parties before the Civil Aeronautics Board,[50] and deter-

---

47. See Interstate Commerce Act, Part I, § 5b, 49 U.S.C. § 5b (1958).

48. Shipping Act, Section 22. Violation of Section 15 by reason of the carrying out of an unfiled and unapproved Section 15-type agreement gives an injured party a right to reparations under Section 22 to the extent that he can prove damages. See *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 5 F.M.B. 216 (1957), *aff'd sub nom. American Union Transp. v. United States*, 257 F.2d 607 (D.C. Cir.), *cert. denied*, 358 U.S. 828 (1958); *Swift & Co. v. Gulf & So. Atl. Havana Conference*, 6 F.M.B. 215 (1961), *rev'd sub nom. Swift & Co. v. Federal Maritime Comm'n*, 306 F.2d 277 (D.C. Cir. 1962), see 7 F.M.C. 431 (1962) (settlement agreement on reparations); *Kempner v. Federal Maritime Comm'n*, 313 F.2d 586 (D.C. Cir. 1963). If the Commission orders reparations, the order may be enforced in a district court and attorneys' fees and costs recovered (Shipping Act, 1916, § 30, 39 Stat. 737 (1916), as amended, 46 U.S.C. § 829 (1958)).

49. Review Act of 1950, 64 Stat. 1129 (1950), as amended, 5 U.S.C. §§ 1031-1042 (1958). These orders include, of course, orders denying reparations, *American Union Transp., Inc. v. United States*, 257 F. 2d 607 (D.C. Cir.), *cert. denied*, 358 U.S. 828 (1958).

50. See *S.S.W., Inc. v. Air Transp. Ass'n of America*, 191 F. 2d 658 (D.C. Cir. 1951), in which the court states at pages 663 and 664:

> "The prayer for treble damages under the antitrust laws raises a different problem. The Civil Aeronautics Act, *unlike* the Interstate Commerce Act and the *Shipping Act*, does not authorize the award of damages by the Board for violation

minations of a stock exchange or orders approving mergers entered by the Comptroller of the Currency are not subject to judicial review (see *Silver v. New York Stock Exchange*, 373 U.S. 341, 358 n. 12 (1963); *United States v. Philadelphia Nat'l Bank, supra*, 374 U.S. at 351). Of all the cases that concern accommodation of regulatory schemes with the antitrust laws, none, save those discussing the exclusive jurisdiction of the Maritime Commission, involves so complete and adequate a grouping of sanctions and remedies as available under the Shipping Act.

Of even greater importance, as the Commission's decision in Docket 872 shows, this panoply of sanctions and remedies was all available to Carnation with respect to the matters alleged in the antitrust complaint. Carnation could have sought reparations for injuries suffered as a result of violations of Sections 15 *and* 16 of the Act[51]; a cease and

---

of its provisions. *Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws.*" (citing *Terminal Warehouse, Cunard* and *Keogh*)

51. Carnation argues that if the Shipping Act remedy is held exclusive it would deny the right to a jury trial provided in the Seventh Amendment of the United States Constitution (Pet. Br., 56-59). This overlooks the basic guarantee of the Seventh Amendment: a jury trial for "Suits at common law" (U.S. Const. amend. VII). The Seventh Amendment does not guarantee jury trial for a recovery of money damages resulting from a statutory violation unknown at common law (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see also Note, Application of Constitutional Guarantees of Jury Trial to the Administrative Process, 56 Harv. L. Rev. 282 (1942); 1 Davis, *Administrative Law Treatise*, § 8.16). A civil suit for damages resulting from a conspiracy in restraint of trade was not known at common law (*U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899)). Carnation's contention was settled as long ago as 1907 in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Carnation says under the Interstate Commerce Act the issue does not arise because of the saving of remedies. However, in both *Abilene* and *Keogh* the plaintiff elected to sue in the courts but reparations awarded by the agency were held to be the exclusive remedy.

desist order was entered by the Commission against the carrying out of the supplementary agreements to Agreement 8200; finally, the finding of violation of two sections of the Act makes respondents subject to suits for $1,000 per day penalties which the United States may recover in a civil action, and to a fine of $5,000 for each violation of Section 16.

The fact that Congress provided complete and adequate remedies is in itself ground for concluding that there was no intention that litigants might proceed under the anti-trust laws if they so preferred. As Judge Augustus Hand stated in the *Cunard* case when it was before the Second Circuit Court of Appeals:

> "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued pari passu."
>
> (*United States Nav. Co. v. Cunard S.S. Co.*, 50 F. 2d 83, 90 (2d Cir. 1931), *aff'd*, 284 U.S. 474 (1932))[52]

Although the full remedies and penalties of the Shipping Act alone are sufficient to demonstrate that Congress intended the sanctions and remedies above to be exclusive, strong policy considerations also point to the same conclusion. The nature of these considerations is well described in the pioneer case, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), in which a simple interpretation

52. This Court has also found the assumption unreasonable that Congress, in providing remedies under a regulatory scheme, intended also to preserve treble damage antitrust remedies. In *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162 (1922), Mr. Justice Brandeis asked:

> "Can it be that Congress intended to provide the shipper from whom illegal rates have been exacted with an additional remedy under the Anti-trust Act?"

of the statute would have led to the conclusion that the remedies and forum provided by the regulatory statute were *not* exclusive.

Abilene, a shipper, brought a common law action in a state court alleging overcharges by the railroad. Sections 9 and 22 of the Interstate Commerce Act stated that shippers had the alternative of bringing actions in courts or before the ICC, and expressly preserved common law causes of action. But this Court found that an overriding need for uniformity of interpretation of the Act and the danger of rebates and preferences inherent in the dual remedies scheme required the conclusion that the ICC "alone is vested with power originally to entertain" such proceedings (*Id.* at 448). The purpose of the Interstate Commerce Act (like the Shipping Act) was elimination of discrimination and prejudice and establishment of rates "which should have a uniform application to all" (*Id.* at 439). Allowance of court suits would mean that different courts would reach different conclusions, destroying uniformity of interpretation and virtually assuring that similarly situated shippers would receive different treatment (*Id.* at 440). Recognition of the right to bring suit in court would be

> "wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." (*Id.* at 441)

The Court pointed out that "no reason can be perceived" for the existence of sanctions and remedies in the regulatory statute and also before the courts *(Ibid.)*. Conceding that the wording of the statute appeared to allow dual

remedies, the Court answered: "the act cannot be held to destroy itself." (*Id.* at 446)

These same considerations are equally applicable to antitrust treble damage actions that allege violations of the Shipping Act, a statute that does not contemplate dual remedies. Carnation is complaining of a rate that it alleges is illegal, and it seeks treble damages therefor. If it should succeed in this endeavor, Carnation would receive a preference over its competitors comparable to a rebate in violation of the many injunctions in the Shipping Act against preferences and against the obtaining of transportation for less than tariff rates. It was to avoid such preferences that the Shipping Act provided for administrative orders of reparations and for financial penalties to be paid to the Government. That the framers of the Act considered court actions and settlements with carriers a danger to the published rate structures is indicated by the prohibition in Section 14, Fourth, of discrimination in "the adjustment and settlement of claims" and in Section 16, Second, of allowing any person "to obtain transportation . . . at less than the regular rates . . . by any . . . unjust . . . device or means." (46 U.S.C. §§ 812, 815 (1958))

It is no answer, as the *Keogh* case makes clear in discussing treble damage actions and the Interstate Commerce Act,

> "to say that each [person injured] . . . might bring a similar action . . . . Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." (*Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922))

As the court of appeals noted: if actions such as Carnation's were allowed it would

> "produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid." (R. 177)

In the endeavor to protect Carnation from the consequences of not timely filing for reparations under the Shipping Act, the Solicitor General has omitted any reference to the awesome penalties to which under his theory the carriers would be subject. However, under the theory espoused the ocean carriers unlike any other industry would be exposed to all the penalties of the regulatory statute and, in addition, all the penalties that apply to unregulated industries:

(1) Fines up to $50,000 or imprisonment up to one year, or both. Sherman Act, § 1 (15 U.S.C. § 1 (1958)).

(2) Treble damages, costs and attorneys' fees (extracted as punishment, Pet. Br. p. 29). Clayton Act, § 4 (15 U.S.C. § 15 (1962)).

(3) Penalties of $1,000 *per day*. Shipping Act, § 15 (46 U.S.C. § 814 (1958)).

(4) $5,000 *"for each offense"* under the Shipping Act, § 16 (46 U.S.C. § 815 (1958)).

Surely Congress never conceived of such a result!

The membership of steamship conferences is international. The foreign commerce of the United States is at the same time the foreign commerce of another nation. Should such massive penalties be applied to conferences and their foreign carrier members there is a danger of retaliatory action by foreign governments that might threaten our foreign commerce and jeopardize our relations with other states (see Legislative Index, *supra* note 34, at 404-05). Unilateral U.S. shipping regulation itself involves

delicate international problems. That is why this Court in the *Pan-American* case (371 U.S. at 310) and the court of appeals below (R. 179) pointed out that foreign policy considerations support the conclusion that Congress did not intend to subject international carriers to treble damage remedies.

III. Dismissal Was the Proper Course

The Solicitor General, speaking for the Commission and not as amicus curiae, is in a strange position to be complaining here that dismissal was improper. Dismissal was the result ardently sought by the Commission before the courts below.[53] The Solicitor, on the Commission's behalf, now rejects the very result the Commission was so successful in obtaining. The rule that a party cannot urge reversal of the very result it requested below (*e.g., Orenstein v. United States,* 191 F.2d 184, 193 (1st Cir. 1951)) is not made inapplicable if that party (here the Commission) changes lawyers.

Moreover, it is well settled that a party that has not taken an appeal or petitioned this Court for certiorari cannot question the correctness of the decree of the trial court (*Alaska Industrial Bd. v. Chugach Electric Ass'n.,* 356 U.S. 320, 325 (1958); *Mechanics Universal Joint Co. v. Culhane,* 299 U.S. 51, 58 (1936); *Federal Trade Comm'n v. Pacific States Paper Trade Ass'n.,* 273 U.S. 52, 66 (1927); *United States v. Blackfeather,* 155 U.S. 218, 221 (1894)). Contrary

53. The Commission intervened as a defendant to move for dismissal of the complaint "on the ground that the Shipping Act, 1916 . . . provides the exclusive remedy for the wrongs alleged in the complaint . . . ." (R. 34-35) The Commission also informed the district court that "defendant intervener's sole purpose in participating in this proceeding is to move the court to dismiss the complaint . . . ." (R. 36) The position consistently urged by the Commission before the courts below coincided with that urged by PWC and FEC (R. 96-98; see Notes 2 and 4, Supplemental Brief in Opposition for Respondent Pacific Westbound Conference, replying to petition for writ of certiorari).

to this rule, the Solicitor, representing the Commission, here urges reversal.

Under Carnation's theory, stay as opposed to dismissal of the antitrust suit is not a possibility. If the *Cunard* doctrine is applicable, antitrust remedies are unavailable. Carnation, accordingly, urges that *Cunard* does not apply and that the court should have proceeded with the antitrust suit without awaiting Commission action (Pet. Br., pp. 20, 29). Accordingly, Carnation never presented the "stay" question below[54] and may not properly argue it here. We have heretofore shown the reasons why *Cunard* and similar cases do apply to this case.

But implicit in the Solicitor General's theory for resolution of this case is the assumption that when the case was before the district court that court should have stayed this action until the Commission decided Docket 872 (S.G. Br., pp. 29-30). Thereafter, according to this theory, a treble damage remedy exists if agreements alleged are held by the Commission to have been unapproved. (Since, however, the Commission has decided Docket 872, a stay, under the Solicitor's view, is not now necessary.) We point out above that the Solicitor General's theory is wrongly conceived and contrary to the rulings in *Cunard, Far East, Pan-American, Terminal Warehouse* and *Keogh*. We wish to point out here that in no case cited by the Solicitor was stay decreed. Rather, as this Court recently concluded in *Pan-American*, "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course" (citing *Cunard* and *Far East*) (371 U.S. at 313 n. 19).

---

54. Petitioner for the first time now raises as a contingent question: "7. In any event was it not error to dismiss rather than to hold waiting agency action if any such action was required?" (Pet. Br., p. 8)

The Solicitor's theory in effect rejects the determination, clearly articulated in this Court's decisions and confirmed with respect to the Shipping Act by the 1961 legislation, that administrative remedies supersede antitrust remedies. Under the guise of asking the Court to limit *Cunard, Far East* and *Pan-American,* the Solicitor General in effect asks this Court to reverse well-settled and highly sensible doctrine on which those cases were based.

That the district court was correct in dismissing the complaint is emphasized by the Commission's recent decision in Docket 872. In that decision the Commission embraced all the questions raised by the complaint as Shipping Act questions. Therefore, it is doubly clear that there remain no antitrust questions without the purview of the Shipping Act for the district court to decide. If Carnation had alleged (or the Commission found) conduct by respondents, such as a merger, violative of the antitrust laws, there might remain antitrust questions for the Court "other than those enumerated in the Act", a situation contemplated in *Pan American* (371 U.S. at 305).

Further proof that dismissal was proper is seen in the fact that the Commission found that approved Agreement 8200 authorizes the parties to "agree to establish" ocean rates (6 SRR at 102), that contrary to Carnation's central allegation (R. 20), there was no secret agreement by which PWC gave up the right to take independent rate action granted in approved Agreement 8200 (6 SRR at 108 and 112); that an agreement respecting concurrence procedures for placing items on the initiative list violated Section 15 (6 SRR at 112); and failure of PWC to take independent action violated Section 16's prohibition of undue prejudice and disadvantage (6 SRR at 112). The Commission's decision leaves nothing for the court to decide.

Finally, the fact that the Commission found the very conduct complained of to raise questions subject to Section 16 of the Act, which section in the Commission's view required FEC to comply with the terms of the unfiled agreement respecting concurrence on items to be placed on the initiative list (6 SRR at 110), shows that this case cannot be viewed as a Section 15 problem alone. The allegations raise problems that are thoroughly intermixed with a variety of other Shipping Act policies, prohibitions, and requirements. Dismissal was proper because all these questions, including the interrelationship between Section 15 and Section 16, are matters for the Commission to decide, subject to judicial review.

As stated in the Memorandum filed by the Solicitor General with this Court in December, 1964, at page 4:

> "The questions involved in this case are whether the alleged secret agreement between Pacific and Far East 'was made in fact; whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed by the Commission' (Pet. App. 31)."

The Commission has determined that the secret agreement alleged did not exist. That ends any contention that antitrust remedies might be applicable.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

San Francisco, California
October 16, 1965

Respectfully submitted,

EDWARD D. RANSOM
R. FREDERIC FISHER
LILLICK, GEARY, WHEAT,
ADAMS & CHARLES
Attorneys for Respondent
Pacific Westbound
Conference, and its
member lines.

CERTIFICATE OF SERVICE

I, EDWARD D. RANSOM, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent Pacific Westbound Conference in the above entitled matter, in whose behalf service of the foregoing Brief has been effected as herein stated.

I certify that on or before October 17, 1965, I served the foregoing Brief of respondent Pacific Westbound Conference by service of three (3) copies upon the attorneys for petitioner, three (3) copies upon the Solicitor General of the United States, three (3) copies upon attorneys for the Federal Maritime Commission, and three (3) copies upon

the attorneys for other respondents, by mailing the sam
at Washington, D. C., postage prepaid, first class mail, t
the addressees in Washington, D. C., and airmail to th
other addressees, as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Arthur B. Dunne
James R. Baird, Jr.
333 Montgomery Street
San Francisco, California 94104
Attorneys for Petitioner

Elkan Turk, Jr.
26 Broadway
New York, New York
Attorney for Respondent Far East Conference and its members

Milan C. Miskovsky
Federal Maritime Commission
Washington, D. C. 20573
Attorney for Federal Maritime Commission

EDWARD D. RANSOM
Attorney for Respondent Pacif
Westbound Conference and it
members